

**COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO**

Banner University Medical Center Tucson
Campus, LLC, an Arizona corporation dba
Banner University Medical Center Tucson; et al.,

v.

Defendants/Petitioners,

Hon. Richard E. Gordon, Judge of the Superior
Court of Arizona, Pima County,

Respondent Judge,

and

Jeremy and Kimberly Harris,

Plaintiffs/Real Parties in Interest.

Jeremy and Kimberly Harris,

Plaintiffs/Cross-Petitioners,

Hon. Richard E. Gordon, Judge of the Superior
Court of Arizona, Pima County,

Respondent Judge,

v.

Banner University Medical Center Tucson
Campus, LLC, an Arizona corporation dba
Banner University Medical Center Tucson; et al.,

Defendants/Real Parties in Interest.

No. 2 CA-SA 2019-0051

Pima County Superior Court
No. C20174589

(Hon. Richard E. Gordon)

**MOTION OF THE
ARIZONA ASSOCIATION FOR
JUSTICE/ARIZONA TRIAL
LAWYERS ASSOCIATION
FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

Stanley G. Feldman, Esq. (000838)
MILLER, PITT, FELDMAN & MCANALLY, P.C.
One South Church Avenue, Suite 900
Tucson, Arizona 85701-1620
(520) 792-3836
sfeldman@mpfmlaw.com
Counsel for Amicus Curiae Arizona Association
for Justice/Arizona Trial Lawyers Association

David L. Abney, Esq. (009001)
AHWATUKEE LEGAL OFFICE, P.C.
Post Office Box 50351
Phoenix, Arizona 85076
(480) 734-8652
abneymaturin@aol.com
Counsel for Amicus Curiae Arizona Association
for Justice/Arizona Trial Lawyers Association

Geoffrey Trachtenberg, Esq. (019338)
LEVENBAUM TRACHTENBERG, PLC
362 North Third Avenue
Phoenix, Arizona 85003
(602) 271-0183
gt@LTinjurylaw.com
Counsel for Amicus Curiae Arizona Association
for Justice/Arizona Trial Lawyers Association

Lincoln Combs, Esq. (025080)
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016
(602) 530-8022
lincoln.combs@gknet.com
Counsel for Amicus Curiae Arizona Association
for Justice/Arizona Trial Lawyers Association

In accordance with ARCAP 16, Amicus Arizona Association for Justice—also known as the Arizona Trial Lawyers Association—moves for leave to file an amicus curiae brief in this matter for the reasons set out in the attached Memorandum of Points and Authorities.

Memorandum of Points and Authorities

Introduction. Amicus’s lawyers have, for over a half-century, represented Arizona tort victims and their loved ones. Amicus’s members have fostered and protected the rights of their clients and the public by: (1) continuing legal training, (2) general public education, (3) legislative presentations, and (4) appellate and trial advocacy. Amicus is the sole Arizona legal association dedicated to fighting for the rights of tort victims and their families.

The fight for justice for Arizona tort victims and their families includes vigorous advocacy in Arizona state and federal trial and appellate courts. The Arizona Court of Appeals, the Arizona Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court have accepted and considered amicus curiae briefs from AzAJ-AzTLA in important cases, including the following:

- *Jackson v. Eagle KMC L.L.C.*, 245 Ariz. 544 (2019).
- *Conklin v. Medtronic, Inc.*, 245 Ariz. 501 (2018).
- *Ryan v. Napier*, 245 Ariz. 54 (2018).

- *Kopp v. Physician Group of Ariz., Inc.*, 244 Ariz. 439 (2018).
- *Quiroz v. ALCOA Inc.*, 243 Ariz. 560 (2018).
- *United States v. June*, 135 S.Ct. 1625 (2015).
- *Parra v. PacifiCare of Arizona, Inc.*, 715 F.3d 1146 (9th Cir. 2013).

Interest of Amicus Curiae. In many cases, private and public employers argue that they cannot be liable under respondeat superior principles if their employees are dismissed from lawsuits for purely procedural or technical reasons with no actual adjudication on the merits.

But the Supreme Court may soon completely abrogate its holding in *De Graff v. Smith*, 62 Ariz. 261 (1945), that dismissal of claims against an employee automatically means dismissal of the claims against the principal. In fact, in the 2018 *Kopp* opinion, the Supreme Court has already “disagreed” with the principles that: (1) a verdict in favor of an employee that nevertheless holds an employer liable for negligence relieves both the employee and the employer from liability and (2) in derivative-liability cases a judgment or dismissal for the employee relieves the employer from liability. *Kopp v. Physician Group of Arizona, Inc.*, 244 Ariz. 439, 441 ¶ 8 (2018) (citing *DeGraff*, 62 Ariz. at 266 and *Chaney Building Co. v. City of Tucson*, 148 Ariz. 571, 574 (1986)).

When a plaintiff suffers injury because of an employee’s negligence, the plaintiff may sue the employee alone, the employer alone, or both. If the plaintiff

only sues the employer, the employer cannot properly obtain dismissal simply because the plaintiff did not sue the employee. It stands to reason that, if the lawsuit cannot be dismissed if the plaintiff did not sue the employee in the first place, the lawsuit cannot properly be dismissed if the employee leaves the lawsuit because of a procedural or technical reason unrelated to the merits of the plaintiff's claims against the dismissed employee.

That is an important concept whose general acceptance will greatly benefit tort victims across Arizona.

Preparation for the brief. Amicus's counsel has read the briefs and the appendices, and has researched legal commentaries, state and federal cases, and other authorities concerning the respondeat superior liability.

Desirability of accepting the brief. Amicus submits that this Court should grant leave to Amicus to file an amicus curiae brief in this matter because Amicus can provide information, perspective, and argument that can help the Court beyond the help the parties' lawyers have provided and will provide in this case. *See* Ariz. R. Civ. App. Proc 16(b)(1)(C)(iii). In particular, Amicus's brief offers a unique perspective on the respondeat superior issues in this matter.

Amicus therefore respectfully moves the Court for leave to file its amicus curiae brief in this matter.

DATED this 28th day of January, 2020.

AHWATUKEE LEGAL OFFICE, P.C.

/s/ David L. Abney, Esq.
David L. Abney
Counsel for Amicus Curiae

Certificate of Compliance

This document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 1,099 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

Certificate of Service

On this date, the above-signing lawyer electronically filed this document with the Clerk of Division Two of the Court of Appeals and electronically delivered it to:

- JoJene Mills, Esq., **LAW OFFICE OF JOJENE MILLS, PC**, 1670 East River Road, Suite 270, Tucson, Arizona 85718, (520) 529-3200, jmills@jmillslaw.com, Attorneys for Plaintiffs-Respondents.
- Lawrence J. Rudd, J.D., **RUDD MEDIATION**, 1414 Ridge Way, Pasadena, CA 91106, (626) 795-3339, lrudd@ruddmediation.com, Attorneys for Plaintiffs-Respondents.
- Arlan A. Cohen, Esq., **LAW OFFICES OF ARLAN A. COHEN**, 1008 S. Oakland Ave., Pasadena, CA 911, (626) 449-9209, arlancohen@gmail.com, Attorneys for Plaintiffs/Respondents
- Eileen Dennis GilBride, Esq., **JONES, SKELTON & HOCHULI, PLC**, 40 North Central Avenue, Suite 2700, Phoenix, Arizona 85004, (602) 263-1700, egilbride@jshfirm.com, Attorneys for Defendants-Petitioners
- GinaMarie Slattery, Esq., **SLATTERY PETERSEN PLLC**, 5981 E. Grant Rd., Ste. 101, Tucson, Arizona 85712, (520) 326-1786, gslattery@slatterypetersen.com, Attorneys for Defendants-Petitioners.

/s/ David L. Abney, Esq.
David L. Abney